IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2182 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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DIGANTSINH DAHYABHAI VAGHELA

Versus

DISTRICT MAGISTRATE

Appearance:

1. Special Civil Application No. 2182 of 2001

MR YS LAKHANI FOR MR PRAVIN GONDALIYA for Petitioner No. 1

MR HL JANI ASSTT GOVERNMENT PLEADER for Respondent No. 1-2,4

MS PJ DAVAWALA for Respondent No. 3

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 12/07/2001

ORAL JUDGEMENT

Heard learned advocate Mr.Y.S.Lakhani, learned advocate for Mr.Pravin Gondaliya on behalf of the petitioner and Mr.H.L.Jani, learned AGP on behalf of the respondent Nos.1, 2 and 4 and Ms.P.J.Dawawala, learned

advocate for respondent No.3 - Union of India.

#. In the present petition, the petitioner has challenged the order of detention dated 21st February, 2001 passed by the District Magistrate, Junagadh District under Article 226 of the Constitution of India. The order of detention has been passed b the District Magistrate, Junagadh District under Section 3[2] of the PBM Act. The present detenu has been detained in Baroda Jail as class-Ii detenu and the grounds of detention are communicated and supplied to the petitioner under Section 8[1] of the PBM Act. The respondent No.1 - detaining authority District Magistrate, Junagadh District has filed reply and the even on behalf of the State Government also, a reply has been filed so also Union of India has also filed reply against the present petition.

#. Learned advocate Mr.Y.S.Lakhani has raised various contentions challenging the detention order but according to his submissions, one or two contentions are enough to vitiate the order of detention. Learned advocate Mr.Lakhani has submitted that looking to Para-9 at pg.22 of the grounds of detention, 5 books have been seized by the concerned authority at the time of inspection and same has been taken into account as relevant documents while passing the detention order against the present petitioner but the detaining authority has not supplied the xerox copy of all the original documents to the petitioner but at pg.101, an abstract of the these five books have been supplied to the petitioner. Therefore, he submitted that supply of abstract amounts to non supply of documents to the present petitioner which was considered by the detaining authority at the time of passing the detention order. In short, his submission is that the petitioner is entitled to all the documents which have been considered and relied upon by the detaining authority. In abstract, all such documents are irrelavant and it amounts to non communication of the grounds of detention to the petitioner. He also pointed out that in absence of all the documents, the petitioner was not able to make an effective representation because after perusing all the documents, the petitioner could have made an effective representation and could have explained whether the documents are genuine or not, whether signature or any writing is proper or not, in other words, the petitioner could have challenged the documents if it had been supplied but mere supply of abstract of such documents was not enough but the petitioner ought to have been supplied with all the documents. He also submitted that if any statement of the petitioner or any other person has been obtained by

the concerned authority and same has been relied upon, in such event, typed copy ought to have been supplied to the petitioner of such statements and in absence of the original documents or xerox copy of such documents, the detenu was not able to any specific answer or could not make effective representation challenging genuineness of such documents, whether writing made in such documents is correct or not and whether any writing is of a particular person or not and signature of particular person is or not and therefore, he submitted that all the documents which were relied upon, were required to be supplied to the petitioner, otherwise, it amounts to non communication of the grounds of detention because documents are the part of the grounds of detention and therefore, it ultimately violated provisions of Article 22[5] of the Constitution of India. Mr.Lakhani, learned advocate has also submitted that the petitioner has raised a specific contention to this effect in grounds [d] and [g] of the petition and therefore, he submitted that in absence of xerox of the actual documents so seized, the petitioner is not able to make an effective representation and therefore, the order of detention is required to be set aside. Learned advocate Mr.Lakhani has also relied upon three decisions of the Apex Court, which are referred as under :-

[1] SMT ICHHUDEVI VS UNION OF INDIA AIR 1981 S.C. 431
[2] SMT SHALINIDEVI MEHTA ETC. VS. UNION OF INDIA, AIR 1980 SC 1983
[3] SOPHIA GULAM MOHM. STATE OF MAHARASHTRA, 1999 SCC [6] pg.593.

#. Learned AGP Mr.H.L.Jani, appearing on behalf of the respondents - State has submitted that there was sufficient compliance by the detaining authority while supplying the abstract of the five bill books to the petitioner and the petitioner could have made effective representation after considering the abstract of the five bill books. He submitted that contention which has been raised by the petitioner in para-[d], has been replied by the detaining authority to the effect that copies of the records are given to the petitioner and the petitioner has not demanded copies which were required by him and therefore, question does not arise of supplying him the copies. However, the detaining authority has further submitted in his reply in para-12 that the petitioner has made confessional statements before the authority, wherein he has clearly admitted that he is purchasing the diesel fro the pump of GFCS Ltd., Madhavad Port at the rate of Rs.17.50 ps. per liter and even as per his

statement, he used to sell the said stock of diesel at the aforesaid rate and the said statement will be referred to and relied upon at the time of hearing of the application and accordingly, both statements were supplied to the petitioner in the grounds of detention. Therefore, according to submissions, learned AGP Mr.H.L.Jani that actual xerox copy of the documents which have been relied upon and referred by the detaining authority were not supplied to the petitioner but the abstract of such documents have been supplied and the same can be considered to be sufficient compliance by the detaining authority and taking into consideration such documents, the petitioner could have made an effective representation after consideration of such abstract supplied to him. Therefore, he submitted that there is violation of Article 22[5] of the Constitution of India and the order of detention has been rightly passed by the detaining authority which is legal and valid one and does not warrant any inference from this Court.

#. Learned advocate Ms.P.J.Dawawala appearing on behalf of the respondent No.3 - Union of India has also supported the detention order and she submitted that a detailed reply has been filed by the Union of India and after considering the material on record, the detaining authority has rightly passed by the order of detention which is legal and valid and therefore supplying abstract of the documents is enough compliance and therefore also no interference is required by this Court.

#. I have considered the respective submission of the learned advocates for the parties. Considering the contention which has been raised by the learned advocate Mr.Lakhani, this Court considers that this is significant issue whether at the time of passing the detention, whatever original documents were relied upon and considered by the detaining authority, xerox copies of that very documents are necessary and the same were required to be supplied to the petitioner or not and whether supplying the abstract can be considered to be sufficient compliance or not, is now required to be examined by this Court.

#. While examining this issue, view taken by the Apex Court is necessary to consider in the facts and circumstances of the present case and therefore, some observations made in the judgment relied by Mr.Lakhani are quoted as under :-

In case of ICHHUDEVI CHORARIA VS. UNION OF INDIA
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reported in AIR 1980 SC p.1963 are necessary to quote here, which runs as under :-

> The detenu was taken under detention on 4th June, 1980 by an order of detention dated 27th May, 1980. The order of detention recited that with a view to preventing him from smuggling goods and abetting the smuggling of goods it was necessary to detain him. After detention he was also served on the same day, the grounds of detention. The grounds of detention referred to several documents and statements including two tape recorded conversations. The detenu addressed a letter dated 6th June, 1980 asking for all statements, documents and material to enable him to make an effective representation against his detention. The detenu also sent a representation dated 9th June, 1980 to the Deputy Secretary once again requesting him to supply immediately the documents etc. relied upon in the grounds of detention and to furnish the transcripts of the tapes as also to produce the original tapes, so that he could prove that the voice recorded on the tapes was not his. The detenu addressed another representation dated 26th June, 1980 to the Chairman of the Advisory Board, the Central Government and the Deputy Secretary to the State Government praying for revocation of the order of detention, wherein he pointed out that by his letters dated 5th, 9th and 14th June, 1980, he had requested for the tapes to be supplied to enable him to prove that the voice recorded on the tapes was not his and that this request had not been complied with and in the circumstances the hearing of the case before the Advisory Board would be futile. Meanwhile the Investigating Officer of the Customs Department was deputed to the Central Prison alongwith the tapes, and the tapes were played in the presence of the detenu and the Deputy Superintendent of the Central Prison on 8th July, 1980. The representations of the detenu were examined by the government, who by their letter dated 15th July, 1980 rejected the representations and declined to revoke the order of detention.

> In the writ petition under Article 32 of the Constitution filed by the mother of the detenu it was contended: (1) that the detaining authority did not serve on the detenu alongwith the grounds of detention, copies of the statements, documents

and tapes referred to in the grounds of detention and it could not, therefore, be said that the grounds of detention were duly served on the detenu as required by sub-section (3) of section 3 of the COFEPOSA Act and clause (5) of Article 22 of the Constitution, and (2) that the detaining authority did not supply copies of such statements, documents and materials until 11th July, 1980 and on that day also, what were supplied were merely copies of the statements and documents and not copies of the tapes which were supplied only on 20th July, 1980 and that this delay was wholly unjustified and the detenu was thus denied the earliest opportunity of making an effective representation and consequently the continued detention of the detenu was illegal and void.

Reliance is also placed one another decision in case of SMT SHALINI SONI ETC. VS. UNION OF INDIA reported in AIR 1981 SC p.431.

(1) The representation by the detenu under the COFEPOSA has not to be made in any prescribed form. There is no formula nor any magical incantation like "open seasame" to be repeated or chanted in order to qualify a communication as a representation. So long as it contains a demand or a request for the release of the detenu in whatever form or language couched and a ground or a reason is mentioned or suggested for such release, there is no option but to consider and deal with it as a representation for the purpose of Article 22(5) of the Constitution. [965DE]

In the instant case the communication dated July 27, 1980 by the counsel for the detenu in W.P. 4344 of 1980 was a representation which was in law required to be considered. The said representation admittedly not having been considered the detenu was entitled to be set at liberty. [965H-966A, C]

(2)The obligation imposed on the detaining authority, by Article 22(5) of the Constitution, to afford to the detenu the earliest opportunity of making a representation, carries with it the imperative implication that the representation shall be considered at the earliest opportunity. Since all the constitutional protection that a detenu can claim is the little that is afforded

by the procedural safeguards prescribed by Article 22(5) read with Article 19, the Courts have a duty to rigidly insist that preventive detention procedures be fair and strictly observed. A breach of the procedural imperative must lead to the release of the detenu. [966B]

(3)Article 22(5) has two facets: (i) communication of the grounds on which the order of detention has been made; (ii) opportunity of making a representation against the order of detention. Communication of the grounds presupposes the formulation of the grounds and formulation of the grounds requires and ensures the application of the mind of the detaining authority to the facts and materials before it, that is to say, to pertinent and proximate matters in regard to each individual case and excludes the elements of arbitrariness and automatism. [966G]

(4) It is an unwritten rule of the law, constitutional and administrative, what whenever a decision making function is entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and the remote. Where there is further an express statutory obligation to communicate not merely the decision but the grounds on which the decision is founded, it is a necessary corollary that the grounds communicated, that is, the grounds so made known, should be seen to pertain to pertinent and proximate matters and should comprise all the constituent facts and materials that went in to make up the mind of the statutory functionary and not merely the inferential conclusions. Now, the decision to detain a person depends on subjective satisfaction of the detaining authority. The Constitution and the statute cast a duty on the detaining authority to communicate the grounds of detaining to the detenu. The grounds communicated must reveal the whole of the factual material considered by the detaining authority and not merely the inferences of fact arrived at. The same result would follow if the matter is looked at from the point of view of the second facet of Art. 22(5), namely the opportunity to make a representation against the order of

detention. [966H-D]

(5)The "grounds" under Article 22(5) of the Constitution do not mean mere factual inferences but mean factual inferences plus factual material which led to such factual inferences. The "grounds" must be self-sufficient and self-explanatory. Copies of documents to which reference is made in the "grounds" must be supplied to the detenu as part of the "grounds". [1967E-F]

Smt. Icchu Devi Choraria v. Union of India & Ors., [1981] 1 S.C.R. p. 642, explained and followed.

The third decision relied upon is in case of SOPHIA GULAM MOHD. BHAM VS. STATE OF MAHARASHTRA reported in 1999 [6] SCC p.593. The relevant observations in para-11 are quoted as under :-

"11. Now, an effective representation can be made against the order of detention only when copies of the material documents which were considered and relied upon by the detaining authority in forming his opinion that the detention of Bham Faisal Gulam Mahammed was necessary, were supplied to him. It is only when he has looked into those documents, read and understood their contents that it can be said that the detenu can make an effective representation to the detaining authority, State or Central Government, as laid down in Article 22[5] of the Constitution which provides as under :

"22.[5] When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order."

#. In light of above observations made by the apex court and considering the facts and circumstances of the present case that documents which were supplied to the petitioner were not all the documents seized and considered by the detaining authority while passing the detention order. It is also noted that five bill books were seized by the concerned authority but only abstract

has been supplied to the petitioner instead of supplying xserox copies of all five bill books and therefore considering, para-9 of the grounds of detention, the detaining authority has not only relied upon the said document but the same were considered by the detaining authority while passing the detention order that on the basis of the five bill books, transactions were found to be illegal. Therefore, these being the vital documents, were required to be supplied in xerox of the original form and therefore non supply of such documents and mere supplying the abstract is not enough compliance which could really enable the petitioner to make an effective representation. Therefore, non supply of the all the documents to the petitioner, has adversely affected the right of the petitioner from making an effective representation and thereby violated Article 22[5] of the Constitution of India and therefore, according to my opinion, the order of detention is required to be set aside.

#. In the result, the preset petition is thus allowed. The order of detention dated 21st February, 2001 passed by the District Magistrate, Junagadh is hereby quashed and set aside. The present petitioner - detenu Digantsinh Dahyabhai Vaghela who has been detained at Baroda Central Jail is ordered to be set at liberty forthwith if he is not required in any other case. Rule is made absolute accordingly with no order as to costs.

Date : 12-7-2001 [H.K.Rathod, J.]

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